86-699

Supreme Court, U.S.
FILED
OCT 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

* * * * * * * * * * * * * * * * * * * *

WANDA ALLEN,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

* * * * * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF ALABAMA

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BRIEF OF PETITIONER

* * * * * * * * * * * * * * * * * * * *

J. LOUIS WILKINSON
503 Frank Nelson Building
Birmingham, Alabama 35203
CHARLES M. PURVIS
503 Frank Nelson Building
Birmingham, Alabama 35203
(205) 2524908

33 pp

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J. LOUIS WILKINSON
503 Frank Nelson Building
Birmingham, Alabama 35203
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QUESTIONS PRESENTED

Was the petitioner's due process rights violated when the trial judge asked a number of prejudicial questions of two witnesses, the answers to which probably caused the defendant-petitioner to be convicted of the most severe form of physical assault under Alabama law, to-wit, attwmpted murder.

PARTIES

In the Circuit Court of Jefferson County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein and Wanda Allen, who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Jefferson County, Alabama, and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction is not yet reported but will be reported as follows:

Allen v. State, _____So. 2d_____ (Cr.App.Ala. 1986)

A copy of the same is submitted in Appendix "A" to this petition.

The order of the Alabama Supreme Court denying the Petitioner's writ of certiorari is not yet reported as follows:

Ex Parte: Wanda Allen
In re: Allen v. State ,
_____So.2d _____(S.Ct.Ala, 1986)

A copy of the same is submitted in Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on August 29, 1986, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in Petitioner's writ include the Fifth Amendment to the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. A copy of these amendments are submitted as Appendix "C" to this petition.

STATEMENT OF THE CASE AND FACTS

I

The petitioner was tried by a jury for Attempted Murder in violation of Sce. 13A-4-2 (1975 Code of Alabama), found guilty, and sentenced to confinement in the state penitentiary for twenty years. An appeal was taken to the Alabama Court of Criminal Appeals, which was affirmed without opinion on April 22, 1986. On June 10, 1986, application for rehearing was denied and on August 29, 1986, a petition for writ of certiorari to the Supreme Court of Alabama was likewise denied.

The basis of petitioner's appeal was that the action of the trial Judge in questioning certain witnesses during her trial violated her right to a fair and impartial hearing consonant with

the Fifth and Fourteenth Amendments to the United States Constitution, because the unwarranted inquiries by the Court injected so much bias and prejudice against the petitioner that the trial became a constitutionally defective procedure. In summary, she was denied a fair trial by the trial judge's intrusion into the proceeding.

II

The petition is based on the following facts:

Petitioner shot her ex-husband on November 12, 1984, during a personal quarrel which developed at his home. The bullet struck the victim in the lung, hit his spinal cord and came out of his back. As a consequence, the victim was confined to a wheelchair.

The defendant testified and contended that the shooting was unintentional and only following the accident did she even realize that the victim had been shot.

The trial Judge, over timely objection, questioned two witnesses as to the extent and permanance of the injuries occasioned by the person shot.

ARGUMENT

Petitioner asserts to this Honorable Court that she was denied her fundamental right to a fair and impartial trial under the Fifth and Fourteenth Amendments to the United States Constitution as they relate to due process of law when the trial judge undertook to become an adversary in the proceeding and dropped his constitutionally mandated role as a nuetral arbiter.

The evidence was undisputed that the defendant fired the shot in question and the averred victim was struck in the chest by same. The only disputed issue was her intent at the time the weapon was fired.

This being the case, the petitioner asserts serious prejudice was engendered

by the Judge questioning both the injured person (Mr. Allen) and the doctor who later examined him (Dr. Cosby) as to the nature and extent of his injury. The trial judge through his examination elicited from the victim that he could only get out of his wheelchair by use of a "sliding board" (although in considerably greater detail). Next, the trial Court itself examined the physician and addressed the facts that both legs were functionless and there was probable partial loss of his lung as well.

Trial counsel objected and asked for a mistrial which the Judge denied although he acknowleged that he knew his questions would "probably upset you" (the defense attorney).

Alabama has a long line of cases which comport to the constitutional duty of a trial judge not to assume the role of an adversary in a criminal case.

In Holmes v. State, 22 Ala. 573, 115 So. 849 (1928), it was said that the interests of public justice counter-balanced with fundamental fairness toward the accused demand that the trial judge should not entertain or, at least, manifest any partiality for or against the accused during the examination of witnesses. Why? Because it is well known that jurors, particularly on close questions (viz. intent) on extremely prone to be influenced by such judicial intimations and to defer to them in rendering their verdict. When the impression is given that the judge has determined the accused guilty, a basis for reversal is furnished.

In Richard v. State, 403 So.2d 293 (Ala.Cr.App. 1981), the state court of appeals reversed, based upon improper judicial questioning. As was the case here, the court in that case found that the examination was not needed to produce required evidence, create clarification, or do justice. Therefore, absent those basic reasons which supply the predicate for a court asking questions such actions amount to an abduction by the judge of his constitutional role and becomes an unconstitutional prejudicial denial of the petitioner's right to due process and constitute reversible error.

CONCLUSION

Based upon the foregoing argument and rationale, and the authorities cited, the petitioner, Wanda Allen asserts that this cause is do to be reversed and remanded for a new trial because of the trial court's flagrant denial of her rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

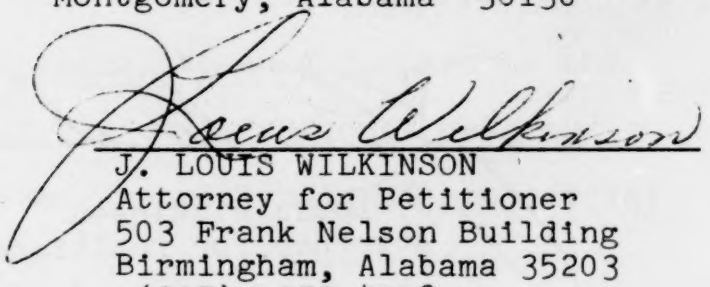
J. Louis Wilkinson
Attorney for Petitioner

Charles M. Purvis
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the attorneys for the Respondent, certified mail, this the 28th day of October, 1986, and addressed as follows:

Honorable Charles Graddick
Attorney General
250 Administrative Building
Montgomery, Alabama 36130



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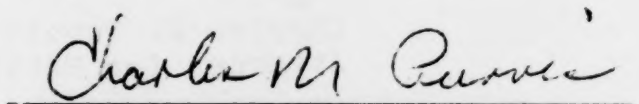

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(205) 252-4908

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APPENDIX "A"

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY, 36101

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON, III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDON
Clerk
Ph. 261-4590

6th Div. 876 JEFFERSON CIRCUIT COURT
CC 85-01535
WANDA ALLEN, ALIAS Appellant
STATE OF ALABAMA Appellee

Dear Sir:

You are hereby notified that on April 22, 1986, the following indicated action was taken in the above styled cause by the Court of Criminal Appeals of Alabama :

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____
As to briefs, see Rules 28, 31 and 32, A.R.A.P.

_____ On motion, record on appeal accepted and considered as timely filed in this Court.

_____ Appellant granted (7) additional days to file brief. Brief due on _____.

_____ Appellee granted (7) additional days to file brief. Brief due on_____.

_____ Appellant granted (7) additional days to file reply brief. Brief due on_____.

_____ Brief of Appellant filed. ____Oral argument requested by appellant.

_____ Oral argument request disallowed; appeal submitted on briefs.

_____ Appeal submitted to the Court for decision in the following manner:

XXX Appeal affirmed. No opinion. Judgment not final, see Rule 41, A.R.A.P.

_____ Appeal dismissed. No Opinion.

_____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

_____ Application for rehearing filed.

_____ Application for rehearing overruled. No opinion. Judgment not final, see Rule 41, A.R.A.P.

_____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

_____ Appeal placed on rehearing ex mero muto.

_____ Certificate of Final Judgment issued to Circuit Clerk.

_____

/s/ Mollie Jordon
CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY, 36101

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON,III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDON
Clerk
Ph. 261-4590

6th Div. 876

JEFFERSON CIRCUIT COURT
CC 85-01535

WANDA ALLEN, ALIAS
Appellant

STATE OF ALABAMA
Appellee

Dear Sir:

You are hereby notified that on June 10, 1986, the following indicated action was taken in the above styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal:_____. As to briefs, see Rules 28, 31 and 32, A.R.A.P.

____ On motion, record on appeal accepted and considered as timely filed in this Court.

____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

____ Appellant granted seven (7) additional days to file reply brief. Brief due on _____.

____ Brief of Appellant filed. _____Oral argument requested by appellant.

____ Oral argument request disallowed; appeal submitted on briefs.

____ Appeal submitted to the Court for decision in the following manner:

____ Appeal affirmed. No opinion. Judgment not final, see Rule 14, A.R.A.P.

____ Appealed dismissed. No. Opinion.

____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

____ Application for rehearing filed.

XXX Application for rehearing overruled. No opinion. Judgment not final, see Rule 41, A.R.A.P.

_____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

_____ Appeal placed on rehearing ex mero motu.

_____ Certificate of Final Judgment issued to Circuit Clerk.

XXX Rule 39(k) motion denied.

/s/ Mollie Jordon
CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY, 36101

October 6, 1986

WILLIAM M. BOWEN, JR.
Presiding Judge
JOHN C. TYSON,III
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDON
Clerk
Ph. 261-4590

Hon. Charles M. Purvis
Attorney at Law
503 Frank Nelson Building

Re: 6 Div. 876
Wanda Allen, alias v. State
Jefferson Circuit Court
CC85-01535

Dear Sir:

The Court of Criminal Appeals has today granted a stay of sixty (60) days from August 29, 1986, to allow filing of a petition for writ of certiorari in the United States Supreme Court. This stay will remain in effect until action is taken on the petition, and if petition is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgment has been recalled from the lower court pending determination by the United States Supreme Court, but the certificate will be reissued upon the expiration of sixty-day stay unless this Court is notified by the United States Supreme Court of the filing of said petition in that Court.

Yours very truly,

/s/ Mollie Jordon

Clerk

cc: Clerk, Jefferson Circuit Court
Office of the Attorney General
File

THE STATE OF ALABAMA - JUDICIAL CIRCUIT

IN THE SUPREME COURT OF ALABAMA

August 29, 1986

85-1097

EX PARTE: WANDA ALLEN

PETITION FOR WRIT OF CERTIORARI

(Re: Wanda Allen v. State)

CCA 6/876

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

SHORES, J. - TORBERT, CJ., JONES, ADAMS & STEAGALL, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 29 day of Aug 19 86 .

/s/ Robert G. Esdale

Clerk ,Supreme Court of Alabama

APPENDIX "C"

a) United States Constitution - Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life, limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

b) United States Constitution - Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE

We, J. Louis Wilkinson and Charles M. Purvis, members of the Bar of the Supreme Court of the United States and Attorneys for Wanda Allen, the Petitioner, do hereby certify that on this 28th day of October, 1986, I did serve the requisite number of copies of the foregoing on the Attorney General of the State of Alabama, Respondent, by mailing same to them, first class, postage prepaid and addressed as follows:

Honorable Charles Graddick
Office of the Attorney General
250 Administrative Building
Montgomery, Alabama 36130

J. Louis Wilkinson

J. LOUIS WILKINSON
Attorney for Appellant

Charles M Purvis

CHARLES M. PURVIS
Attorney for Appellant

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